Supreme Court, U.S.
FILED
MAY - 5 1994
OFFICE OF THE CLERK

No. 93-1585

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NANCY ANONSEN and MICHAEL ANONSEN, individually and as next friends of WILLIAM BOOHER, Jr.,
Petitioners,
v.
PHIL DONAHUE, MULTIMEDIA ENTERTAINMENT, INC., MULTIMEDIA, INC., JOSE PRETLOW, KTRK, INC. D/B/A KTRK-TV, and MIRIAM BOOHER,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals for the First District of Texas

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the first amendment entitle a mother to speak of difficulties she faced after her husband (a police officer) raped and impregnated her then 11-year old child, given 1) she spoke the truth and revealed no name but her own, 2) the rapist was never punished and remained a police officer, 3) the facts disclosed were no longer private, and 4) she never pledged confidentiality?

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BRIEF IN OPPOSITION

Respondent Miriam Booher respectfully submits this brief in opposition to the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Disposition Below

Miriam Booher appeared as a guest on the "Donahue" television show and spoke of difficulties she faced after her husband (a police officer) raped and impregnated her then 11-year old daughter (Nancy Anonsen). She said she adopted her daughter's baby (William Booher, Jr.) and divorced her husband, who was never punished and remained a police officer. She disclosed no name but her own and spoke only the truth.

Miriam's children (Nancy and William) and former son-in-law (Michael Anonsen) sued her and the other respondents for publicizing private facts and inflicting emotional distress. All respondents moved for summary judgment on grounds that Miriam's statements were protected by the Texas and United States Constitutions; alternatively, that uncontroverted evidence negated essential elements of the alleged torts. (Tr. 78-105, 940-948).

The trial court granted summary judgment without specifying the grounds; hence, the judgment could be affirmed on any grounds raised at trial. **Carr v. Brasher**, 776 S.W.2d 567, 569 (Tex. 1989). The court of appeals affirmed on first amendment grounds. The Texas Supreme Court denied petitioners' application for writ because it presented "no error which requires reversal, or which is of such importance to the jurisprudence of the State as to require correction." Tex. R. App. P. 133(a).

B. Statement Of Facts

A counterstatement of the evidence is required to correct errors in petitioners' version.

1. The Rape And Resulting Publicity

In 1972, Miriam Booher learned that her 12-year old daughter (Nancy Anonsen) was pregnant. (Tr. 382-383). Miriam did not know the rapist's identity at the time. (Tr. 384). After Nancy gave birth to William Booher, Jr. ("Little Bill"), Miriam and her husband adopted Little Bill. (Tr. 387-390). In 1977, Miriam discovered that the rapist was her husband (William Booher, Sr.), an Arkansas state trooper. (Tr. 390-392).

Petitioners now claim that Miriam was a "criminal accessory" to her child's rape. No such claim was asserted in the Texas courts. It is groundless and desperate.

Likewise, petitioners falsely claim that Miriam disclosed a "closely held family secret". It was no secret that Nancy (a pregnant child) had been raped. And it was widely known before the Donahue program that the rapist was her father; and Little Bill, her biological son. Nancy admitted telling co-workers, employers, the Arkansas police and Judge Norman Lee (Harris County district judge). (Tr. 101-102, 181, 308, 543, 599-629, 676-677, 688, 736-742, 1320-1321). Miriam told friends (Tr. 89-104, 370-528), and Little Bill told classmates. (Tr. 336, 754, 777-778, 1324). In Miriam's words, it was "the talk of the city". (Tr. 407). Little Bill said "everybody knows". (Tr. 427). Nancy's friend, Tamara Hill, estimated that at least 25,000 people in Bryant, Arkansas knew. (Tr. 574). The director of the Arkansas state police said he knew. (Tr. 133, 498).[1]

Petitioners falsely state that Miriam never reported the rape to the police before the Donahue program. In truth, she had told the director of the Arkansas state police (Tr. 133, 498), as well as Officer Gary Robinson. (Tr. 1046-1047). Before the Donahue program, Officer Booher's incest was common knowledge at the Lafayette County police department and the criminal investigation division of the Arkansas state police. (Tr. 104, 498).

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[1]An addendum to the co-defendants' motion for summary judgment summarizes the evidence. Part 1 of the addendum identifies individuals who knew. (Tr. 89-101). Part 2 identifies those who were told by petitioners. (Tr. 101-103). Part 3 identifies the extent to which it was common knowledge. (Tr. 103-104). Part 4 indicates the extent to which the Arkansas police knew. (Tr. 104).

2. Events Leading To The Donahue Program

In 1988, Miriam Booher wrote to Donahue about the rape, stating that the rapist was her ex-husband and a state trooper. (Tr. 471, 515). Little Bill helped write the letter, and an employee at the district attorney's office typed it. (Tr. 473). Miriam said she told her story because victims of sexual abuse need to know they are not alone and the social problem requires public discussion. (Tr. 476-477).

Originally, Little Bill wanted to appear with his mother on the Donahue program. (Tr. 480). He changed his mind after he moved to live with his father, telling his mother:

> I don't want to hurt daddy. He might lose his job. But if you want to go, it's fine with me.

(Tr. 479-481).

Nancy Anonsen also wanted to appear on the program. She said: "Oh, Mama... I just love Donahue, and they stay in such fancy motels." (Tr. 485). Later, she changed her mind, but told her mother to go and "tell them that it's not my fault; I didn't do anything wrong." (Tr. 486-488).

Whether or not Nancy or Little Bill wanted their mother to appear on the program, there is uncontroverted evidence that they never told her not to do so. (Tr. 481-488). Moreover, the record is devoid of any evidence or allegation that Miriam "pledged" not to do so.

3. The Donahue Program

Miriam Booher appeared on the program with other victims of sexual abuse, a counselor and a psychologist. (Tr. 113).[2] Phil Donahue introduced the program's topic:

> More and more victims of incest and rape are keeping their babies. Do you understand that? Do you think it's a good idea? Would you keep your baby if your pregnancy were the result of a violent assault? Would you keep your baby in the case of incest? And will this be a reminder of a painful moment for the rest of your life? How do you emotionally relate to a child who is born out of this kind of painful experience? Meet (Miriam) Booher. Your daughter gave birth to a baby that was actually fathered by your husband.

(Tr. 213).

Miriam discussed how she met her husband, her decision to adopt her daughter's baby, her discovery that her husband was the father, and their divorce after Little Bill turned 16. She revealed no names and never said where Nancy, Little Bill or her ex-husband lived. (Tr. 113-121).

A clinical psychologist, Dr. John Briere, appeared on the program to explain causes of sexual abuse and how to cope with it. Shirley Turcotte, a counselor, addressed problems that victims must overcome. Other victims of sexual abuse related their own stories of survival. Organizations that assist incest victims were identified. Regarding Miriam Booher's appearance, Dr. Briere stated:

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[2]The record includes a videotape of the program.

"I'm quite impressed with her bravery." (Tr. 114). Regarding the program itself, Dr. Briere stated:

> I think... we have to face the fact that our culture is a violent culture, where people with lesser power are often dramatically exploited. This is also a culture where that *has to remain a secret* in order for the exploitation and the degradation to continue. *Breaking that secret* through talk shows, radio programs, books, whatever, *is extremely important*. (emphasis added).

(Tr. 116).

The show's producer, Jose Pretlow, said his purpose was to let incest victims know they are not alone and where they can go for help. (Tr. 933). Miriam Booher's undisguised appearance, he said, increased the program's impact and removed Officer Booher from the police force. (Tr. 938).

Contrary to petitioners' claims on appeal, Miriam did not discuss details of the rape, Donahue did not admit he sensationalized programs, and the program was not entitled "Forbidden Pregnancies".[3]

4. The Impact Of The Donahue Program

After the Donahue program, then Governor Clinton ordered an investigation and Officer Booher quickly resigned. (Tr. 144-145). However, contrary to petitioners' allegation, there is no evidence that the disclosures on the Donahue program permitted anyone not already familiar with

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[3]The program was entitled "Pregnancy from Incest". (Tr. 1238).

Miriam's story to link it to Nancy or Little Bill; nor is there evidence that Nancy and Little Bill "began receiving medical treatment for the trauma" caused by the program.

REASONS FOR DENYING WRIT

I. THE FIRST AMENDMENT ENTITLED MIRIAM BOOHER TO SUMMARY JUDGMENT

A. The Right To Speak The Truth Is Fundamental

The right of free speech is a fundamental individual liberty, "essential to the common quest for truth and the vitality of society." **Hustler Magazine v. Falwell**, 485 U.S. 46, 50-51 (1988). All citizens have this right, not just the media. **Murdock v. Pennsylvania**, 319 U.S. 105, 111 (1943).

No court has ever held a mother liable for revealing that her husband raped her child. No court has ever held that one must remain anonymous when sharing important experiences in one's life. Neither this Court nor any Texas court has ever upheld recovery for 1) publicizing private facts, 2) causing emotional distress by telling the truth, or 3) publishing a rape victim's name. To the contrary, whenever this Court or any Texas court has addressed free speech, privacy and emotional distress, the right to speak the truth has always prevailed. As stated in **Smith v. Daily Mail Publishing Co.**, 443 U.S. 97, 102 (1979), "state action to punish the publication of truthful information seldom can satisfy constitutional standards."

Generally, the first amendment precludes states from imposing liability for protected speech unless the state can prove 1) it has an interest that overrides the federal interest

in free speech, and 2) the basis for liability is narrowly tailored to serve the state interest. **The Florida Star v. B.J.F.**, 491 U.S. 524 (1989); **Cox Broadcasting Corp. v. Cohn**, 420 U.S. 469 (1975)(publication of rape victim's identity privileged); **Hustler Magazine v. Falwell**, 485 U.S. 46 (1988)(first amendment precludes liability for infliction of emotional distress absent proof of knowing falsehood). In each of these cases, this Court held that the state efforts to punish speech violated the first amendment. Likewise, the Texas court in this case vindicated free speech, concluding that federal interests outweighed any Texas interest in privacy or freedom from emotional distress.

The Texas court's refusal to elevate Texas interests over the federal interest in free speech is consistent with Texas jurisprudence. After all, the Texas Supreme Court has held that the Texas Constitution (art. I, §8) is more protective of speech than is the first amendment. **Ex parte: Tucci**, 859 S.W.2d 1 (Tex. 1993); **Davenport v. Garcia**, 834 S.W.2d 4 (Tex. 1992).[4] Moreover, it recently abolished the tort of negligent infliction of emotional distress. **Boyles v. Kerr**, 855 S.W.2d 593 (Tex. 1993). And it has never adopted the tort of publication of private facts.[5]

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[4]Art. I, §8 provides:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or the press.

[5]North Carolina abolished the tort as unnecessary and constitutionally infirm. **Hall v. Post**, 372 S.E.2d 711 (N.C. 1988). See also, **Cox Broadcasting Corp. v. Cohn**, 420 U.S. 469, 489 (1985)(tort of

B. Booher Spoke The Truth About Matters Of Public Concern

The Texas court had no difficulty concluding that Miriam Booher's story was of legitimate public concern:

> [W]e have no doubt that, as a matter of law, the crimes of incest and rape, the victimization of innocent people whose lives are touched by those crimes, and the importance of fostering understanding and healing of those victims, are matters of legitimate public concern.

857 S.W.2d at 704. The court could well have added that the story led to identification and removal of a rapist from the Arkansas police force.

The privilege to discuss matters of public interest extends to all interesting phases of human activity and embraces all issues about which information is needed or appropriate to cope with exigencies. **Time, Inc. v. Hill**, 385 U.S. 374, 383 n.7 (1967); **Campbell v. Seabury Press**, 614 F.2d 395, 397 (5th Cir. 1980). The privilege is broad and extends beyond political and public affairs to all matters customarily called "news" and all matters giving information to the public for purposes of education, amusement or enlightenment. **McNamara v. Freedom Newspapers, Inc.**, 802 S.W.2d 901, 904 (Tex.App.- Corpus Christi 1991, writ den.). Body surfing is a matter of legitimate public interest. **Virgil v. Time, Inc.**, 527 F.2d 1122, 1129 (9th Cir. 1975).

The privilege to disclose information of legitimate public concern stops only when it becomes a morbid and

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publication of private facts is constitutionally suspect).

sensational prying into private lives for its own sake. **Sipple v. The Chronicle Publishing Co.**, 201 Cal. Rptr. 665 (Cal. App. 1984); **Hall v. Post**, 372 S.E.2d at 714; *Rest. (2d) of Torts* § *652D*. Comment f to § 652D states:

> Those who commit crime... are... persons of public interest, concerning whom the public is entitled to be informed. The same is true as to... the victims of crime... These persons are... properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them.

Illustration 15 (under comment f) identifies the birth of a child to a 12-year old as a matter of public interest. The illustration is based on **Meetze v. The Associated Press**, 95 S.E.2d 606, 610 (S.C. 1956)("there are times when one, whether willingly or not, becomes an actor in an occurrence of public or general interest.").

Miriam Booher's statements addressed a dark, national tragedy. She was not guilty of morbid and sensational prying. Indeed, there was no prying at all. She merely shared her own experience coping with rape and incest. As a matter of law, her statements were of legitimate public concern.

C. Booher Had The Right To Reveal Her Own Identity

Petitioners claim that Miriam Booher should have concealed her identity because it was not newsworthy. The Texas court properly determined that the newsworthiness of Miriam's identity was irrelevant. 857 S.W.2d at 705.

Miriam herself was a victim of the family tragedy of incest. Her story was about her own life. It was her decision to remain anonymous or not.

The first amendment is not the only constitutional basis for Miriam's right to speak of family matters openly and undisguised. This Court has recognized a constitutional zone of privacy that includes the right to freely make important personal decisions--with or without legitimate reasons. See e.g., **Roe v. Wade**, 410 U.S. 113 (1973)(right to terminate pregnancy); **Griswold v. Connecticut**, 381 U.S. 479 (1965)(right to use contraception).

Assuming Miriam needed a legitimate reason to reveal her identity, she had one. Her case history provided a personal frame of reference and sense of urgency that psychologists and counselors sitting alone could not provide. Revealing her identity lent credibility to her story. Moreover, remaining anonymous would have conflicted with the program's central theme--that silence about incest increases the chance it will recur and inhibits emotional healing. Thus, Miriam Booher was entitled to tell her story without remaining nameless or faceless.

Several cases support Miriam's right to tell her story. In **Campbell v. Seabury Press**, 614 F.2d 395 (5th Cir. 1980), the defendant wrote an autobiography that discussed his brother's marriage. The brother's wife sued, alleging publication of private facts. The 5th Circuit affirmed summary judgment for defendant on first amendment grounds.

The brother's wife argued that even if the autobiography was of public interest, there was no reason for it to discuss her marriage. The 5th Circuit disagreed, finding reason enough in the fact that the brother's wife was the brother's wife:

> A review of the record... clearly shows the requisite logical nexus. An account of the author's close association with his... brother certainly is appropriate... Likewise, accounts of his brother's marriage as they impacted on the author have the requisite logical nexus to fall within the ambit of constitutional protection.

Id. There was a logical nexus between Miriam's life and her name; hence, her autobiography would not have to be anonymous. There was also a logical nexus between her life and every event that impacted on it, including the fact that her daughter had her husband's baby. This triggered first amendment protection.

In **Ross v. Midwest Communications, Inc.**, 870 F.2d 271 (5th Cir. 1989), the defendant disclosed the identity of a rape victim in a documentary about a convicted rapist. The 5th Circuit affirmed summary denial of the victim's privacy claim on first amendment grounds. As in **Campbell**, the rape victim argued that the public interest did not justify disclosure of her identity. Once again, the 5th Circuit rejected the argument. Noting that "loss of credibility comes with anonymity" and that "numbers... are easily forgotten... and... have less impact", the court concluded that disclosure of the victim's identity strengthened the impact and credibility of the program. That rendered the disclosure privileged as a matter of law. Quoting **Gilbert v. Medical Economics Co.**, 665 F.2d 305, 308 (10th Cir. 1981), the court added that disclosures of identity "obviate any impression that the problems... are remote or hypothetical, thus providing an aura of immediacy and... urgency." Id.[6]

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[6]See also, **Dresbach v. Doubleday & Co., Inc.**, 518 F.Supp. 1285, 1287 (D.D.C. 1981), another autobiography/privacy case that the Texas court discusses at length. 857 S.W.2d at 706.

The same considerations protect Miriam Booher's decision to reveal her identity.

D. Booher Did Not Waive Her Rights

Petitioners argue for the first time that Miriam Booher waived her right to share her experience by "pledging" not to do so. However, the record contains no evidence of any such promise; let alone, an enforceable promise.

Moreover, the "waiver" argument was never raised at trial or on appeal. Accordingly, the Texas trial and appellate courts had no occasion or authority to consider the "waiver" argument. **San Jacinto River Auth. v. Duke**, 783 S.W.2d 209, 210 (Tex. 1990)(appellate court may not reverse summary judgment on grounds raised sua sponte); **City of Houston v. Clear Creek Basin Auth.**, 589 S.W.2d 671, 676 (Tex. 1979)(issues not expressly presented to trial court in writing cannot be considered on appeal). And as stated in **Youakim v. Miller**, 425 U.S. 231, 234 (1976), "this Court does not decide questions not raised or resolved in the lower court."

E. Conclusion: Free Speech Prevails

Miriam Booher shared her own experience coping with incest in her family. She revealed no name but her own. She disclosed that the rapist had never been brought to justice and was still a police officer. The question is whether she had a constitutional right to speak without concealing her identity.

The answer is "Yes". The first amendment protects Miriam Booher because she disclosed information of public interest that was true and lawfully obtained. **The Florida Star v. B.J.F.**, 491 U.S. 524 (1989). Incest is a matter of public interest, as are the efforts of victims and family

members to cope with it. Miriam Booher's undisguised appearance enhanced the program's credibility and impact, as well as its central theme that secrecy is the culprit. That was her constitutional right.

Public interest aside, the first amendment protects Miriam Booher's right to talk about intimate details of her life and events that impacted on it. This includes the right to say: "I am Miriam Booher. My husband raped my daughter."

The Texas courts had every opportunity to declare that some state interest was of sufficient magnitude to override the federal interest in free speech. Their refusal to do so should be dispositive.

Finally, petitioners ignore the fact that Miriam Booher's disclosure led to identification and removal of a rapist from the Arkansas police force. In the Texas courts, petitioners dismissed this as "incidental" and an unintended fluke. However, Miriam's original letter to Donahue stated that William Booher, Sr. was a police officer, and Donahue himself pointedly asked during the program: "Whatever happened to your ex-husband?" (Tr. 121). There was no fluke and the result was hardly "incidental". Moreover, truthful disclosure of matters of public interest is protected regardless of motive. **Hustler Magazine v. Falwell**, 485 U.S. 46 (1988). We share a fundamental faith that the free flow of ideas, especially when true, promotes the interest of society. The wisdom of this faith is reflected in the removal of the rapist from the police force.

At the outset, we noted that no woman ever faced liability for disclosing that her husband raped her daughter. For the reasons advanced, Miriam Booher should not be the first.

II. THE TEXAS JUDGMENT IS CONSISTENT WITH THIS COURT'S RULINGS

Petitioners argue that the Texas judgment conflicts with **Florida Star v. B.J.F.** However, the argument misconstrues the Texas judgment and **Florida Star**.

A. Petitioners Misconstrue The Scope Of The Texas Ruling

Petitioners falsely claim that the Texas ruling creates an absolute privilege to disclose "any firsthand knowledge about anyone". The Texas court said no such thing. Having created a "strawman", petitioners proceed to destroy it by observing that it would permit 1) rapists to publicize the names of their victims, 2) doctors to disclose those who test HIV-positive, 3) employees to disclose trade secrets, 4) lawyers to violate "gag" orders, 5) professors to brag about having sex with a particular student, and 6) settling parties to violate confidentiality agreements.

However, the Texas ruling did not even remotely address any of these situations. Instead, the Texas court faced a unique situation that required it to balance the federal interest in free speech with the Texas interest in privacy and freedom from embarrassment. The specific question presented concerned a mother's right to speak of the incestuous rape of her daughter, the mother's reaction to that tragedy, its impact on her life, the birth of the child of that rape, adopting and raising that child, and her eventual discovery of the truth about her husband. And with respect to that particular situation (which no court has ever addressed), the Texas court ruled in favor of free speech.

Petitioners also argue for the first time that the Texas court's "absolute privilege" abridges their constitutional right

of privacy. We do not understand the argument, but two things are clear. First, the argument is based on a false caricature of the Texas court's ruling. Second, petitioners never suggested at trial or on appeal that their constitutional right of privacy was at stake. It is too late to raise that argument now.

B. Petitioners Misconstrue "Florida Star"

There are two basic differences between this case and **Florida Star**. First, in **Florida Star**, the private fact was revealed by one who had no connection with the story other than to report it. Miriam Booher's intimate involvement in her story presents an issue not addressed in **Florida Star**.

Second, **Florida Star** addressed a state effort to override federal interests and punish protected speech. There, this Court established constitutional requirements for punishment. Specifically, the state must demonstrate an interest of sufficient magnitude to override the federal interest in free speech, and it must show that the basis for punishment is narrowly tailored to serve that state interest.

However, this case involves no state effort to punish speech; hence, there is no issue of whether the state met constitutional requirements for punishment. The Texas court simply determined that, with respect to this particular case, no Texas interest in privacy or freedom from distress outweighed the federal interest in free speech. Nothing in **Florida Star** required the Texas court to do otherwise.

III. EVEN IF THE TEXAS ANALYSIS IS FLAWED, THERE IS NO COMPELLING REASON TO GRANT WRIT

A. The Facts Are Unique And There Is No Conflict Of Opinion

As this Court has stated, it does not sit for the benefit of particular litigants or to resolve academic issues. **Rice v. Sioux City Cemetery, Inc.**, 349 U.S. 70, 74 (1955)("special and important reasons" for granting writ imply a problem beyond the academic or episodic). Because this Court's adjudicatory resources are scarce, certiorari should not be granted except to resolve issues of public importance or to resolve embarrassing conflicts of opinion among the states' highest courts or the federal circuit courts. **Layne & Bowler Corp. v. Western Well Works, Inc.**, 261 U.S. 387, 393 (1923).

This Court has more pressing matters than to fashion remedies for daughters embarrassed by mothers. And there is no conflict of opinion in this regard, for the present case is the only one to address the issue.

B. Federal Rights Were Vindicated

The fact that the Texas court vindicated a first amendment right, thereby upholding a federal interest over a state interest, provides another reason to deny writ. As Justice Stevens (dissenting) explained in **Delaware v. Van Arsdall**, 475 U.S. 673, 690-708 (1986), the primary role of this Court is to make sure that persons who seek to vindicate federal rights are fairly heard. Accordingly, the need to review state decisions that uphold federal rights is secondary to the need to scrutinize judgments disparaging those rights.

C. The Texas Court Could Have Ruled On State Law Before Reaching The First Amendment

In this case, all respondents moved for summary judgment on grounds that the essential elements of the alleged torts were negated, and on grounds that Booher's speech was protected by art. I, § 8 of the Texas Constitution. (Tr. 940-948). These arguments were reiterated throughout the Texas appellate process.

Specifically, Booher argued that Texas has yet to adopt the tort of publication of private facts and ought to reject it; further, that even if the tort was adopted, dismissal would be appropriate because the facts disclosed were widely known and no longer private. As for the tort of intentional infliction of emotional distress, Booher noted, among other things, that the element of outrageous conduct was absent. Also, Booher argued that the Texas Constitution (art. I, §8) is more protective of speech than is the first amendment; further, that the Texas Supreme Court has based decisions on art. I, §8 without needing to reach the first amendment.

As Justice Stevens explained in **Van Arsdall**, this Court's policy is to avoid reaching federal constitutional questions if a case can be decided on other grounds. Likewise, federal district courts must decide state-law issues before reaching federal constitutional issues. State courts should be encouraged to do the same. And one way to provide encouragement is to deny writ when a state court reaches a first amendment issue without first addressing issues of state law--particularly when state law provides a promising basis for disposition.

D. Petitioners Propose No Legal Principle

Though petitioners reject what they perceive the Texas court's holding to be, they propose no legal principle that would ever permit summary vindication of first amendment rights in this type of case. Their briefs to the Texas courts suggested that there should be no such legal principle; rather, juries should decide whether a parent's true but embarrassing statements about family matters are of sufficient public concern to merit protection. This is a sure way to open the litigation floodgate, chill free speech and erode constitutional rights. In light of this alternative, the decision of the Texas court should stand. As Justice Douglas stated in **Time, Inc. v. Hill**, 385 U.S. 374 (1967):

> A trial is a chancy thing, no matter what safeguards are provided. To let a jury on this record return a verdict or not as it chooses is to let First Amendment rights ride on capricious or whimsical circumstances for emotions and prejudices often do carry the day.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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